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ABSTRACT

A survey and analysis of various fairness issues related to teacher evaluation and the pursuant legal challenges to placement on the Texas Teacher Career Ladder by the use of a statewide teacher appraisal system are presented in this report. Analysis of legal trends in Texas indicates that strict compliance has been required in situations where evaluation procedures are clearly identified in statutes and policies. Challenged decisions related to evaluation have been upheld in situations of school board attentiveness to evaluation requirements. Issues involving content rather than procedure, however, require a trained evaluator. Case analysis indicates that teachers are responsible to demonstrate the arbitrariness and bad faith of a district's career ladder selection process and decision. Appendices include lists of incentive programs by state, employee grievances, teaching standards, and guidelines to encourage student participation. (50 references) (LMI)

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MANDATING STATEWIDE TEACHER APPRAISAL: EMERGING LEGAL ISSUES

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by
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MANDATING STATEWIDE TEACHER APPRAISAL:
EMERGING LEGAL ISSUES

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MANDATING STATEWIDE TEACHER APPRAISAL: EMERGING LEGAL ISSUES

I. Introduction

The quality of education in America has generated great national concern. Within the last few years reports documenting that elementary and secondary schools are not producing well educated students have come to the forefront on the national educational scene.[1] In 1983, A Nation at Risk, the report of the National Commission on Excellence in Education, was among the first to throw a caustic spotlight on America's schools.[2] Along with this report come over 30 others including the report of Mortimer Adler and his Paideia Group[3] and John Goodlad's comprehensive study, A Place Called School.[4] These reports called for re-evaluating academic content, standards, expectations, time re requirements and teaching. In examining the various factors to determine the cause of declining quality in education, a major focus has been on evaluating those who teach.

State legislatures, including Texas, have responded to the increasing demands for teaching accountability by intervening and enacting laws requiring periodic appraisal of teacher performance. Over half of the states now have statutes imposing specific teacher evaluation requirements, with some 25 states legislating programs that involve a career ladder concept. Results of these

evaluations may be used for various employment decisions including retention, tenure, dismissal, promotion, salary, reassignment and reduction in teaching force.

In Texas, the teacher evaluations are used to place teachers on a career ladder. Texas law mandates that teacher evaluation outcomes will be used to qualify a teacher for placement and promotion on a teacher career ladder and subsequent salary increases.

Since its inception in 1985, hundreds of law suits relating to the Texas Teacher Appraisal System and career ladder placement have come to the Texas' Commissioner of Education for resolution. Beginning with Etzel v. Galveston I.S.D.[5] several principles regarding procedural fairness have emerged from these Texas cases to guide the Commissioner in developing an equitable system. When personnel decisions are based on the outcome of teacher evaluations as they are in Texas, and when those decisions are tied to salary increases and recognition, issues regarding procedural fairness generally surface. Such issues in Texas have included whether or not statutory and established state and local procedures were followed; whether or not school officials employed equitable standards in evaluation; whether or not sufficient evidence was collected to support the evaluation or career ladder decision; and whether or not evaluations were conducted in a fair and consistent manner.[6]

This paper will review and analyze some of the issues related to procedural fairness for teacher evaluation in Texas and discuss the efficacy of a

statewide teacher appraisal system put into effect in Texas. It will include the statutory history relating to regulation of teacher evaluation and career ladder placement in Texas. The report will analyze the impact of appeals of career ladder decision pursuant to the statutory regulation of teacher evaluation. Finally, it will survey legal trends which have implication to school boards and administrators in developing equitable guidelines and policy statements in order to avoid legal challenges to teacher evaluation and career ladder decisions.

Specific objectives to be covered are:

1. To review the historical background of the appraisal system in Texas.
2. To explain the components of the statewide appraisal system.
3. To understand the nature of the suits that have been filed, and the trends of the decisions.
4. To review the more pertinent administrative and judicial decisions affecting the appraisal process.
5. To discuss other laws that impact the appraisal and decision-making process.
6. To discuss what constitutes "conditions of work" in a Right to Work state.
7. To understand the issue of "content" vs "procedure".
8. To determine policy issues and needs.

II. History: Statutory regulation of Teacher Evaluation and Career Ladder Placement in Texas

Texas has joined over half the states in the nation in enacting statutory regulation of teacher evaluation. The Texas Teacher Appraisal System, which was implemented on a statewide basis in the Fall of 1986, is intended to encourage professional growth for teachers and to improve instruction in the classrooms of Texas.

Texas House Bill 72, enacted by the 68th Legislature, directed by the State Board of Education to adopt an appraisal process and criteria with which to appraises the performance of teachers for " career ladder purpose." This legislation created a statutory linkage between career ladder options and salary opportunities for teachers in Texas.

In designing the Texas Teacher Appraisal System, the State Board of Education and its committees made efforts to build a practical, usable system that could be applied fairly to teachers in all subjects and grade levels. Due to the narrow legislative focus, the Texas appraisal system does not include an assessment of all aspects, duties and responsibilities of teaching. The system has been based primarily upon existing classroom-based research regarding job-related, observable behaviors in teaching, as required. The appraisal system emphasizes the professional growth of teachers; but, because the teacher appraisal system was designed as part of the teacher career ladder system

established by the legislature, it also must serve in distinguishing among the performances of teachers across the state.[7]

According to Texas Education Code, 13.302 the legislature mandated that the appraisal criteria be based upon observable, job-related behaviors. 19 Texas Administrative Code, Section 149.41 contains the general provisions of the appraisal process. According to 19 Texas Administrative Code, Section 149.43 the State Board of Education was directed to provide:

1. at least two appraisals during each of the two appraisal periods within periods within the regular school year;
2. a uniform training program for appraisers of teacher performance including uniform appraiser certification standards; and
3. inclusion of teacher self-appraisal in the appraisal process.[8]

In as effort to provide an appraisal system that met all of the guidelines set forth in the legislative mandates, the Texas Education Agency conducted a review of literature on teaching effectiveness, surveyed other states where statewide appraisal systems had been implemented, and gathered information form 156 school districts in Texas regarding the teacher evaluation systems that were being used in those districts. Subsequently, a job-relatedness survey, which has as items those behaviors identified in the previous processes, was conducted. Thirty thousand teachers, stratified by gender, race/ethnicity, teaching field, teaching

assignment and years of experience were asked to respond to items in terms of observability, importance, and frequency of use. Approximately 17,000 responses were received. A list of teaching behaviors to be considered for inclusion in the appraisal instrument was derived from this survey.

Career Ladder, Section 13.303, Texas Education Code, requires each school district to use the appraisal process and performance criteria developed by State Board of Education in appraising teachers for career ladder assignment purposes. The State Board of Education rules relating to the career ladder are outlined in 19 Texas Administrative Code, Section 149.71, et. seq.

Since its implementation in 1986, there have been legislative revisions relating to the Texas Teacher Appraisal System and Career Ladder placement and maintenance requirements. The latest revisions were enacted by House Bill 2566 during the 71st Legislative session, July 1989, and overturned by the Supreme Court in March of 1990. The latest criteria for entry and maintenance on the teacher career ladder are outlined in Figure 1.[10]

III. Impact: Appeals to Career Ladder Decisions

In November, 1985 the Commissioner of Education issued his first decision involving an appeal to the career ladder. Since then, hundreds of career ladder decisions have been filed. The best guidance for school

personnel and board members making career ladder decisions is to follow the career ladder statutes, the regulations of the Texas Education Agency, and the Commissioner's interpretations of those statutes and regulations. Some of the commissioner's interpretations of the statutes and regulations and relates some interpretations of the statutes and regulations and relates some implications and trends that school boards should consider when determining local school board policies regarding evaluation. [11]

The more than 100 commissioner decisions and court cases that have resulted from the appraisal/career ladder legislation have followed some trends that are worth discussing. Of the 98 commissioner decisions between November 1985 and April 1989, the district has prevailed in 82 of the decisions, while teachers have prevailed in only 16. This indicates a strong tendency for the Commissioner to uphold the actions of the local school boards in making appraisal and career ladder decisions. Of the suits in which the teachers have prevailed, the issues they are most likely to win on are related to: challenging local policies and interpretations of the law; the use of state funds for career ladder placement; the need for local hearings on career ladder placements; and, arbitrary or capricious decision-making on the part of the board. When analyzing the cases overall, there are eleven (11) major categories into which all cases fall:

*timely appeals

*timely notice
*performance ratings and criteria used
*quotas for career ladder levels
*adjusting scores
*use of information on years of experience
*what counts for higher education coursework
*non-teaching performance
*sufficient opportunity to be heard
*challenges to district rules and policies
*procedural violations

A. "Arbitrary and Capricious" Standard of Review

A teacher may appeal a career ladder decision made by a local career ladder committee to the local school board. If a teacher intends to appeal a decision of a career ladder committee, he/she must follow local policy and seek a timely review of the decision by the school board.

The standard of review used by the school board in reviewing the committee's decision is a matter for the board to decide. The board is only required to change decisions of the committee that were arbitrary and capricious or made in bad faith. The board is not required to accept the recommendation of the committee and has the power to grant a teacher request that could have been granted by the career ladder committee itself. Therefore, if a board determines that a committee's decision cannot or should not stand, the board may make the career ladder assignment itself or send the appeal back to the committee to reconsider. Likewise, when a teacher appeals a career ladder decision of a school board to the Texas Commissioner of Education, the teacher must comply with the regulations of the Education Agency and file a timely Notice of Intent to Appeal and a Petition for Review. Untimely appeals are subject to dismissal by the

Education Agency. While the school board has the right to adopt a different standard of review when hearing appeals from the decisions of the career ladder committee, the Commissioner may be only review appeals from the career ladder decisions of school boards under the "arbitrary and capricious or made in bad faith" standard.

Section 13.319 of the Education Code indicates that a career ladder decision of a school district "is subject to appeal only if the decision was arbitrary and capricious or made in bad faith." The "decision" to which the statute refers is the decision of the school board.[12]

B. The Impact of Etzel v. Galveston I.S.D.

The Texas State Commissioner of Education made noteworthy interpretations of the law concerning "procedural fairness" of the appraisal process in Etzel v. Galveston I.S.D. Docket No.231-19-885, December 17, 1987.

Curtis Etzel, a teacher for Galveston I.S.D. appealed the decision of the Galveston I.S.D. School Board to the Commissioner because the school board had refused to hear his grievance concerning his 1984-85 evaluation. Mr. Etzel advised the school district's superintendent that he wanted to challenge the procedures utilized in his evaluation as well as the ratings he received. He complained that,

> "after informing Mr. Etzel of the descriptors and criteria for evaluation, those descriptors and in some instances criteria were not used in one of his observations. Moreover, the summative evaluation does not reflect the result of the second evaluation."[13]

The superintendent would not allow Mr. Etzel to appeal or grieve the

complaint of deficiencies in relation to his evaluation. However, Mr. Etzel was offered an appearance before the Board of Trustees to pre-sent his petition for consideration to the extent required under the case of of Prof. Assn. of Coll. Educ. v. El Paso Cty. Community District.[14]

Prior to this time Mr. Etzel had appeared before the School Board on two occasions and related his dissatisfaction with his evaluation. Galveston Independent School District grievance policy specifically indicates that the grievance procedure does not apply to contents of personnel evaluations. Galveston I.S.D. policy relating to the appraisal "process" provided that:

> "For the 1984-85 school year, each teacher shall have at least one summative appraisal completed by two appraisers.
>
> "The two appraisers shall confer and prepare the summative appraisal. Equal weight shall be given to each appraiser's data.[15]

1. Content Versus Procedure

The teacher attempted to present grievances to the school board concerning both procedure and contents of his evaluation. Local policy excluded the contents of evaluations as grievable matter. Mr. Etzel was offered an informal appearance before the school board, but he declined. Mr. Etzel asserted that he was entitled to pursue his grievance concerning the procedures used during his evaluation through the school district's grievance policy. The State Commissioner of Education will uphold a school district's interpretation of its own policy if it is a reasonable interpretation, Scott v. Spring Branch I.S.D.[16]

In this case, the Commissioner ruled that although complaints concerning the contents of personnel evaluations are clearly excluded from the Galveston I.S.D. grievance policy, it is not reasonable to interpret the policy to exclude Mr. Etzel's complaint concerning the procedure used during his evaluation because the policy by which an employee is evaluated is a "condition of work."[17] Mr. Etzel's complaint alleged that a Galveston I.S.D. "appraisal process" policy was misapplied in that not all of the descriptors were used and that the summative evaluation did not reflect the second evaluation. Therefore, the Commissioner ruled for Mr. Etzel to be allowed to pursue his grievance concerning the "procedural" misapplication of the policy pursuant to Galveston I.S.D. district grievance policy DGBA.

2. Conditions of Work

The teacher, Mr. Etzel, purported that he has a right to grieve both the procedure and the contents of his evaluation pursuant to Tex. Rev. Civ. Stat. Ann. Art. 5154C, Sec. 6 (Vernon, 1971), which says:

> "The provision of this Act shall not impair the existing right of public employees to present grievances concerning their wages, hours of work, or conditions of work individually or through a representative that does not claim the right to strike."[18]

The Attorney General's opinion holds that "the term 'conditions of work' should be construed broadly to include any area of wages, hours or conditions of employment, and any other matter which is appropriate for communications from employees to employer concerning an aspect of their relationship." Op. Tex.

Att'y. Gen. No. JM-177 (1984).[19]

The Attorney General has implied a very liberal interpretation of the term "conditions of work." Although the contents of a performance evaluation are subjective in nature, the significance of the contents of a performance evaluation in a teacher's continued employment, in addition to their importance on a teacher's career ladder placement is a "condition of work" within the meaning on Tex. Rev. Civ. Stat. Ann. Art. 5154c, Sec. 6.[20]

3. Right to Grieve

The Commissioner points out that it is important to note that the career ladder statutes do not affect the right to grieve. Although Tex. Educ. Code Section 13.319 states that the career ladder decision of the district is final and nonappealable unless it is arbitrary and capricious or in bad faith[21] and section 13.320 states that career ladder placement does not vest in a teacher a property right,[22] Section 13.323 specifically provides that "(n)othing in this subchapter affects a teacher's right to .....present grievances under Chapter 135, Acts of the 50th Legislature, Regular Session, 1947 (Article 5154c. Vernon's Texas Civil Statutes)."[23] Therefore, Mr. Etzel is entitled to grieve the contents of his evaluation, although not necessarily through the district grievance Policy DGBA, which excludes grievances concerning the contents of evaluations.

4. Presentment (Stop, Look and Listen)

The Commissioner also indicated that it is important to determine what constitutes "presenting" a grievance for the purposes of Art. 5254c, Sec. 6. As

noted by the court in Beverly v. City of Dallas, 292 S.W.2d 172, 176 (Tex. Civ. App.---El Paso 1956, writ ref'd n.r.e.),"The presentation of a grievance is in effect a unilateral procedure."[24] The Attorney General also ruled that although "the right to present grievances necessarily implies that someone in a position of authority is required to hear them" such an authority "is under no legal compulsion to take any action to rectify them." Op. Tex. Att'y Gen No. H-422 (1974).[25]

From the foregoing, the Commissioner requires under Art.5154c, Sec. 6 that an employee be given the right to communicate his or her complaints about "conditions of work" to someone in a position of authority. The only obligation of the person in a position of authority is to "stop, look, and listen" Prof. Ass'n. of Coll. Educ. v. El Paso Cty. Comm., 678 S.W. 2d 94, 96 (Tex App. ---El Paso 1984, writ ref'd, n.r.e.):[26] See also Corpus Christi Ind. Sch. Dist. v. Padilla, 709 S.W. 2d 700 (Tex.App.---Corpus Christi, no writ).[27]

Mr. Etzel claimed that Art. 5154c, Sec. 6 entitled him to formally grieve the contents of his performance evaluation to the Galveston I.S.D. Board of Trustees. Although there is no evidence that the teacher informally met with his evaluator or someone else in a position of authority, he was offered the opportunity to appear before the Board of Trustees to present his complaints. There is no evidence that he took this opportunity, although it appears that he did appear before the Board twice to discuss his evaluation prior to when Galveston I.S.D. notified him that they were declining his request to grieve the complained deficiencies pertaining to his evaluation. The issue here is whether this offer from Galveston I.S.D. met the requirements for "presentment" as set forth in Art. 5154c, Sec. 6.

In addressing what constitutes "presentment" as used in Art. 5154c, Sec. 6, the Commissioner referred to the recent Padilla case. In this case, this was an open forum policy at every regular meeting of the Board whereby any person could address the Board about a matter of concern. The plaintiffs in Padilla who were bus driver, wished to grieve their reassignments, but did not avail themselves of the open forum method of presentment. The court ruled that the Board's open forum policy at the Board meetings satisfied the requirement for "access to those in authority in order to air their grievance."[28]

In Padilla, the bus drivers were offered the opportunity to address their concerns to the Board as indicated by Art. I sec. 27 of the Texas Constitution, which provides, that "(t)he citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address, or remonstrance."[29] Using the holding in Padilla as a reference, the Commissioner concluded that the offer to Mr. Etzel to appear and present his grievance, similar to the open forum policy, satisfies the "presentment" requirement of Art. 5154c, Sec.6. Even though Mr. Etzel did not avail himself of this method of presentment, Galveston I.S.D.'s procedure of offering him an appearance before the Board satisfied the presentment requirements of Art. 5154c, Sec. 6.

5. Board of Trustees as Inappropriate Hearing Body for TTAS Content Issues

The Commissioner noted that in most circumstances a board of trustees is not an appropriate body to revise ratings or scores on indicators on the appraisal

instrument of the Texas Teacher Appraisal System, except when there is evidence of a procedural defect that results in an incorrect rating.

The Commissioner ruled that where a "teacher disagrees with the evaluator's professional judgment, the board should not substitute its judgment for that of a trained evaluator. Such an action would be completely contrary to the goals of the Texas Teacher Appraisal System as implemented in the 1986-87 school year." The State has expended tremendous resources in developing the appraisal system and in training over 14,000 evaluators. The goal of the appraisal process is to establish a uniform evaluation program conducted by individuals, trained in the use of the appraisal instrument, who actually observe the performance of the teacher and who subsequently record that performance on the evaluation instrument. The Commissioner noted particularly that the local Board of Trustees has not normally been trained in the area of personnel evaluation and have not actually observed the teacher's performance. Thus, it would not generally be appropriate for the Board to consider content-related grievances. The Commissioner pointed out that it was noted in Padilla that a grievance need only be heard by someone who has authority to act upon the grievance. The Commissioner ruled that in grievances involving judgments of criteria where no procedural defect resulting in an incorrect rating is alleged, the initial evaluator and then other administrators trained in the TTAS would be the appropriate levels to grieve these content issues according to local policy. The Commissioner relates that such individuals are in a position of authority and are empowered to take action on the grievance should that be warranted. The Commissioner upheld that it was appropriate that the grievance process be concluded at the level of the district superintendent (Padilla at 13-14).[30]

6. Conclusions of Law

In the Etzel v. Galveston I.S. D. case, the Texas Commissioner of Education made the following conclusions of law:

1. The Galveston I.S.D. policy was procedurally misapplied and Mr. Etzel was entitled to pursue his complaint through the grievance policy of Galveston I.S.D.
2. Mr. Etzel was entitled to communicate to his employer his concerns about the "procedure" used during his evaluation and the ratings he received according to Tex. Rev. Civ. Stat. Ann. Art. 5154, Sec.6 (Vernon 1971).[31]
3. Mr. Etzel was entitled to grieve the "contents" of his evaluation as a "condition of work" according to Tex. Rev. Civ. Stat. Ann. Art. 5154c, Sec. 6 (Vernon 1971).[32]
4. Galveston I.S.D.'s local grievance policy does not govern grievances concerning the contents of evaluations.
5. Galveston I.S.D.'s offer of an appearance before its Board of Trustees to present Mr. Etzel's grievance satisfied the "presentment" requirement of Tex. Rev. Civ. Stat. Ann. Art. 5154c, Sec. 6 (Vernon 1971).[33]

6. Mr. Etzel's appeal was granted only to the extent that he was denied the right to grieve procedural defects of his evaluation under the Galveston I.S.D. district policy and was denied in other things.

IV. Other legal issues that have been considered

Although the areas described above have been those in which most clarification and precedent have been brought thus far, there are several other areas that have been litigated that are worthy of mention. These areas are some of the ones that most concern teachers, and impact administrators.

A. Stricter performance criteria

This area has had a variety of suits brought under Sec. 16.057 (c) (2), Tex, Educ. Code. Suits have been filed in the areas of timing, quotas, performance only as a stricter criterion, and adjustment of evaluation scores.

As the regulations stand, each school district can develop and implement stricter performance criteria for teachers' entrance and maintenance on the career ladder. The commissioner has ruled that teachers usually will not know what the actual placement or maintenance standard is when they are calculated, because the use of stricter performance criteria is dictated by the minimum amount required to be spent, divided by the number of teachers meeting the minimum requirements, a fact not known until the following school year. [McMillan v. Alief ISD, Dkt. No 023-R9-986 (Comm'r. Educ. July 18, 1988]. As a result, teachers scores are and their effect on the teachers' placement on the career ladder or maintenance on the

career ladder are not known until all scores are completed for the school year and calculations made with the allocated funds available. In a related issue, teachers sought definition of what could be used to determine stricter performance criteria. The Commissioner has ruled in this matter that only 'performance' may be used as a stricter criterion; other factors, such as attendance, are inappropriate to be used in determining performance as part of the stricter performance criteria. [Maas v. Everman ISD, Dkt, No 207-R9-885(Comm'r Educ. Sept. 1, 1988)]. In an earlier decision to determine the definition of performance, the Commissioner that there was performance of a non-teaching nature as well, and that appraisal items concerning "extra-duties" and extra-curricular duties" were irrelevant to teaching performance, [Smith, et al. v. Bishop CISD, Dkt. No. 357-R9-786 (Comm'r Educ. Oct 15, 1987)]. In addition, he clarified that the use of evaluation category of "positive attitude toward teaching profession" and "efforts towards creating a positive image of public education to district residents" was improper to use in determining performance, [Martin v. Bullard ISD, Dkt. No. 200-R9-885 (Comm'r Educ. Nov. 18, 1987)]. Neither of these indicators appear in the current appraisal instrument.

As a result of funding allocations, and in many districts the lack of local funds available to supplement the state allotment, some districts implemented a quota system. In this system, the number of persons who could be placed onto the career ladder at a given level were restricted, and each campus was given a specific number of persons that they could place onto each level through a quota system developed by the district. The Commissioner has ruled in two separate cases in this area. In Wolfe v. Lampasas ISD, (Dkt. No, 106-R9-1286, Comm'r Educ. Jan. 22, 1988), Dr. Kirby stated "the use of campus quotas is to be considered a disfavored practice." He went on, in Wallace v. Pleasanton ISD, (Dkt. No. 068-R9-1186, Comm'r. Educ. Sept. 1, 1988), to say that under "extraordinary circumstances

a quota system might be approved..." These two decisions, however, provide little guidance for a district. The existence of financial exigency in many districts has provided an opportunity for many of the districts to continue the practice of providing quotas to the campus level administrators so that a balance of teachers at each level of the career ladder may be maintained throughout the district.

Along the same line, numerous districts have "adjusted" scores to developed a more equitable method of career ladder placement among disparate scoring patterns of administrators. In a 1988 commissioner's decision [Heffington v. Big Spring ISD, Dkt. No. 036-R9-1086 (Comm'r Educ. Nov 18, 1988)], Commissioner Kirby ruled that "where evidence showed a significant variance among evaluation scores on district campuses, the district could use a mathematical formula to level the disparities." However, he went on the state that such methods "are not favored." It should be noted here that the decision did not introduce numerical facts to show what the Commissioner found to be a significant variance. In another appeal decided shortly before Heffington, a district's adjustment formula was thrown out because the board had not adopted the evaluation system formally in policy, and because the district had no rationale to support its supposition that the ratings on the different campuses were arbitrary. Kiklas, et al. v. Waller ISD, Dkt. No. 184-R9-286 (Comm'r. Educ. Oct .21, 1988). In an earlier decision, the Commissioner had determined that it was okay to adjust scores "...to take into account the inevitable differences among individual appraisers." Smith, et al. v. Bishop CISD, Dkt. No 357-R9-786 (Comm'r. Educ. Oct 15, 1987). In another case, the question was asked again, "Can a district adjust TTAS scores?" The question was posited as "...if a district has a significant deviation in the number of high scores among its campuses, can it use a formula to level out the scores?" This has been on the Commissioner desk since January 1989, and has not yet been determined.

B. What is grievable in an evaluation/appraisal?

It appears at this point in time that **everything** in the evaluation is grievable. However, The Commissioner has been careful to point out that school boards should not substitute their judgment for that of a trained evaluator in matters involving content, rather than procedure, of an evaluation. [Falvey v. Alief ISD, Dkt. No 1130-R9-1185 (Comm'r. Educ. Dec. 17, 1987); Etzel v. Galveston ISD, Dkt. No. 231-R9-885 (Comm'r. Educ. Dec, 17, 1987)]. The Commissioner has taken the philosophy that appraisers opinions are off limits as a grievance, and that the board cannot change the scores of an evaluation that has been procedurally correct.

The companion question then is "What's worth grieving?" Beyond the first level of the process, employees realistically can only hope to correct procedural errors; content is rarely changed. All appeals that have been successfully brought by teachers have been won on violations of procedure, not content. From the perspective of an administrator, there appears to be little threat of having the appraisal challenged and losing if all of the procedural aspects and timelines were appropriately implemented.

V. Implication for School Board Policy

Legal trends in Texas indicate that when evaluation procedures are identified in statutes and school board policies, the Commissioner generally requires strict compliance with these provisions. Where school boards have been attentive to evaluation requirements and written those into their

policies, the Commissioner has upheld challenged career ladder placement decisions related to evaluation. However, the Commissioner has been reluctant to interject his judgment or the judgment of school boards into the teacher evaluation process. Review by the Commissioner has generally been limited to procedural issues of fairness and reasonableness. The Etzel v. Galveston I.S.D. case, decided by the Commissioner of December 17, 1987, has helped to set these trends in Texas and addresses the need for several important school board policies relating to the Texas Teacher Appraisal System and Career Ladder placements.

Etzel v. Galveston I.S.D. presented the need for school board grievance policies to address content and procedural issues relating to evaluations. To assure that school boards are providing appropriate guidance to their administrators and personnel, policies relating to evaluations should state that:

> "Teachers may present grievances regarding the evaluation process and shall receive a written response. Grievances involving solely the content of evaluation shall be concluded at the Superintendent level. The employee may present a concern involving the content of evaluations to the Board, but the Board shall not substitute its judgment on particular ratings for the

professional judgment of a trained evaluator. 19 TAC 149.43 (d) (2) Falvey v. Alief I.S.D. Comm. of Ed. Dec. 113-R3-1185 (1987); Etzel v. Galveston I.S.D., Comm. of Ed. Dec. 231-R9-885 (1987)."[34]

Etzel v. Galveston pointed out the need for a school board policy relating to conditions of work such as the following:

"Employees' existing right under the law shall not be impaired to present grievances concerning their wages, hours of work, or conditions of work. Art. 5154c Sec. 6, V.A.T.S."[35]

Etzel v. Galveston referred to an employee's right to grieve and can be addressed by the following sample school board policy:

"Employees shall have the right, in a peaceable manner, to assemble together for their common goals and apply to those invested with the powers of government for redress or grievances or other purposes, by petition, address, or remonstrance. Tex. Const., Art. I, Sec. 27,"[36]

Presentment was a major issue in Etzel v. Galveston and could be included in local school board policy in the following way:

"Presentment:

An employee's legal right to present a grievance is satisfied at each

level when someone in a position of authority hears the employee's concern; however, that authority is under no legal compulsion to take action to rectify the matter. Att'y Gen. Op. H-422 (1974); Corpus Christi I.S.D. v. Padilla, 709 S.W. 2d 700 (Tex. App. -- Corpus Christi, 1986, no writ"[37]

Board's Role:

The Board shall provide an opportunity at its meetings for employees to present their grievances for Board Consideration. Prof. Ass'n of Coll. Educ. v. El Paso Cty. Comm., 678 S.W. 2d 94 (Tex. App. -- El Paso 1984, writ ref'd. n.r.e.)"[38]

The Appendix contains a set of suggested policy statements relating to teacher evaluation and career ladder. The Appendix also contains suggested school board policies on Employee Complaints which cover the issues addressed in Etzel v. Galveston I.S.D. These policies include an employee's statutory right to grieve; conditions of work related to grievances; grievances involving solely content issues to be concluded at the superintendent's level; the Board not substituting its judgment for the professional judgment of a trained evaluator; and an employee's legal right to present a grievance and have it satisfied a each level when someone in a position of authority hears the employee's

concern.

Other suggested school board policies relating to TTAS and Career Ladder included in the Appendix contains suggested policies from TASB for further handling of employee complaints with the purpose of providing the employees an orderly process for the prompt and equitable resolution of complaints. This policy is designed to resolve complaints at the lowest possible administrative level.

Also in the Appendix is suggested wording of school board policy to relate to appeals on the Career Ladder for teachers. It states that the District's decision regarding a teacher's career ladder placement may be appealed only if the decision was arbitrary and capricious or made in bad faith according to Education Code 13.319, 19 TAC 149.71.39

In order to avoid legal challenges, school boards must be attentive to the need for equitable, legitimate, and current policies relating to teacher evaluation such as the samples policy statements contained in the Appendix.

V. Summary and Conclusions

This paper has surveyed and analyzed various "procedural fairness issues" related to teacher evaluation and the pursuant legal challen-

ges to placement on the Texas Teacher Career Ladder by the use of the Texas Teacher Appraisal System.

Review by school boards and the Commissioner has generally been limited to procedural issues of fairness and reasonableness.[43] Beyond the first level of the process, employees realistically can only hope to correct procedural errors; content is rarely changed. Of the 27 appeals raising issues concerning evaluations decided between October 5, 1987 and November 1, 1988, only three were partially successful.[44] Each involved an obvious violation of procedure. Citing State Board regulations requiring the use of two different appraisers, the Commissioner declared a 1984-95 evaluation to be null and void because only one appraiser had evaluated the teacher's performance. David, et. al. v. Garrison I.S.D., Dkt. No. 087-R9-1186 (Comm'r Educ. Mar 7, 1988).[45] Also, where the school district had used a three-point evaluation scale in a prior year, rather than the five ratings required by state law, the Commissioner ordered the district to use the current year evaluation. Dominquez, et. al. v. Cotulla I.S.D., Dkt. No. 296-R9-586 (Comm'r Educ. March 9, 1988).[46] And, in the Etzel case cited in the previous section of this report, the Commissioner remanded the matter for hearing because the local board refused to hear the grievance errors brought

by Mr. Etzel.[47]

In summary, legal trends in Texas indicate that when evaluation procedures are identified in statutes and school board policies, the Commissioner has generally required strict compliance with these provisions. Where school boards have been attentive to evaluation requirements, the Commissioner has upheld challenged decisions related to evaluation. Everything in the evaluation is grievable. However, the Commissioner has been reluctant to interject his own judgment or the judgment of school boards into the teacher evaluation process. He has been careful to point out that school boards should not substitute their judgment for that of a trained evaluator in matters involving content, rather than procedure, of an evaluation. Falvey v. Alief I.S.D. Dkt. No. 113-R3-1185 (Comm'r Educ. Dec. 17, 1987);[48] Etzel v. Galveston I.S.D., Dkt. No. 231-R9-885 (Comm'r Educ. Dec. 17, 1987).[49]

It appear from the cases that the burden rests on the teacher to show that the school district's career ladder selection process and decision was arbitrary and capricious or made in bad faith. The career ladder statutes and regulations are sometimes vague and complex and even well-intentioned actions can violate the standard. If a district treats one teacher differently under local policy than it does others, it must be able to justify that inconsistent treat-

ment.[30] The history of legal trends has shown that if all persons involved in career ladder decision making are well versed in the statutes and regulations, and if their local school district policies are equitable and current, legal challenges can often be avoided.

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INCENTIVE PROGRAMS — 1988

	Local Initiative Only	Pilots with State Funding and/or Assistance	Full Implementation of State Program	State Program Under Development	Discussion No Legislative Action Pending	Type of Program
Alabama						
Alaska	X					Teacher Incentive
Arizona		X				Career Ladder
Arkansas		(Not funded)				Career Development
California			X			Mentor Teacher
Colorado		X(1)		X(2) (Not funded)		(1) Teacher Incentive (2) Teacher/School Incentive
Connecticut				X		Teacher Incentive
Delaware		X				Career Development
Florida			X			School Incentive
Georgia		X				Career Ladder
Hawaii				X		Mentor Teacher
Idaho				(Not funded)		Career Compensation
Illinois		X				Teacher Incentive
Indiana			X(1)	X(2)		(1) Mentor Teacher (2) Career Ladder/ Development
Iowa			X			Teacher Incentive
Kansas	X					Teacher Incentive
Kentucky		(Completed in 1987)				Career Ladder
Louisiana				X		Career Options/ School Incentive
Maine			X			Tiered Certification Incentive
Maryland	X					Career Development Incentive
Massachusetts			X(1)	X(2)		(1) Teacher Incentive (2) Mentor Teacher
Michigan	X					Teacher Incentive
Minnesota	X(1)	X(2)				(1) Teacher Incentive (2) Mentor Teacher
Mississippi			X			Teacher Incentive
Missouri			X			Career Ladder
Montana	X					Teacher Incentive
Nebraska						
Nevada						
New Hampshire	X					Teacher Incentive
New Jersey			X			Teacher Incentive
New Mexico					X	
New York			X			Teacher Incentive
North Carolina		X				Career Ladder
North Dakota						
Ohio		X				Career Development
Oklahoma	X					Teacher Incentive
Oregon		X				Career Development Mentor Teacher
Pennsylvania		X(1)	X(2)		X(3)	(1) Career Development (2) Career Development/ Mentor Teacher (3) Teacher Incentive
Rhode Island		(Under consideration)				Mentor Teacher
South Carolina		X(2)	X(1) X(3)			(1) Teacher Incentive (2) Principal Incentive (3) School Incentive
South Dakota			X			Mentor Teacher
Tennessee			X			Career Ladder
Texas			X			Career Ladder
Utah			X			Career Ladder
Vermont						
Virginia	X	(Complete in 1986)				Career Ladder/ Teacher Incentive
Washington			X			Mentor Teacher
West Virginia					X	Teacher Incentive
Wisconsin				X		Mentor Teacher
Wyoming	X					Career Ladder/ Teacher Incentive

Southern Regional Education Board

PERSONNEL-MANAGEMENT RELATIONS: EMPLOYEE COMPLAINTS

DGBA

HANDICAP LAWS AND TITLE IX

Employees may present complaints alleging any action prohibited by Section 504 of the Vocational Rehabilitation Act of 1973 or alleging sex discrimination in employment practices. *34 C.F.R. 104.7, 106.8(b)*

REDRESS OF GRIEVANCES

Employees shall have the right, in a peaceable manner, to assemble together for their common goals and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address, or remonstrance. *Tex.Const., Art. I, Sec. 27*

WAGES, HOURS, CONDITIONS OF WORK

Employees' existing right under the law shall not be impaired to present grievances concerning their wages, hours of work, or conditions of work. *Art. 5154c, Sec. 6, V.A.T.S.*

EVALUATIONS

Teachers may present grievances regarding the evaluation process and shall receive a written response. Grievances involving solely the content of evaluations shall be concluded at the Superintendent level. The employee may present a concern involving the content of evaluations to the Board, but the Board shall not substitute its judgment on particular ratings for the professional judgment of a trained evaluator. *19 TAC 149.43 (d)(2); Falvey v. Alief ISD, Comm. of Ed. Dec. 113-R3-1185 (1987); Etzel v. Galveston ISD, Comm. of Ed. Dec. 231-R9-885 (1987)*

RIGHT TO REPRESENTATION

An employee, or a group of employees where appropriate, may present a grievance individually, through an attorney, or through any other person or organization that does not claim the right to strike. *Art. 5154c, Sec. 6, V.A.T.S.; Corpus Christi Fed. of Teachers v. Corpus Christi Independent School District, 572 S.W.2d 663 (Tex. 1978); Sayre v. Mullins, 681 S.W.2d 25 (Tex. 1984); 19 TAC 61.232(b)*

FREEDOM FROM RETALIATION

No retaliatory action shall be taken by the Board or any administrator against an employee or other participant in a grievance proceeding because of participation in the grievance procedure. *19 TAC 61.232(c)*

PRESENTATION

An employee's legal right to present a grievance is satisfied at each level when someone in a position of authority hears the employee's concern; however, that authority is under no legal compulsion to take action to rectify the matter. *Att'y Gen. Op. H-422 (1974); Corpus Christi ISD v. Padilla, 709 S.W.2d 700 (Tex.App.--Corpus Christi, 1986, no writ)*

BOARD'S ROLE

The Board shall provide an opportunity at its meetings for employees to present their grievances for Board consideration. *Prof. Ass'n of Coll. Educ. v. El Paso Cty. Comm., 678 S.W.2d 94 (Tex.App.--El Paso 1984, writ ref'd, n.r.e.)* [See DGBA (LOCAL)]

AGGRIEVED PARTY

An employee aggrieved by a violation of a constitutional, statutory, or common law right, a rule adopted by the State Board of Education, or a policy adopted by the Board shall be afforded a hearing before the Board in accordance with applicable law. However, this provision shall not be construed to create an independent right to a hearing before the Board in addition to hearings required by law. *19 TAC 61.231(b),(c)(2)(A)*

NOTICE

The aggrieved employee shall make a written request for a hearing, identifying specifically the claimed violation and the relief requested. The written request shall be deemed filed upon receipt by the Superintendent's office. Unless a shorter time period has been adopted by local policy, the request shall be filed with the Superintendent's office not more than 30 days after the claimed violation. *19 TAC 61.231(c)(1)*

HEARING

Unless a shorter time period has been adopted by local policy, the Board shall conduct a hearing within 30 days of receipt of a written request. However, the hearing may be postponed by mutual consent. The Board shall notify the aggrieved employee in writing of the time and place of the hearing. The Board shall notify the aggrieved employee of its decision in writing within 15 days after the hearing. *19 TAC 61.231(c)(2)(D)*

PERSONNEL-MANAGEMENT RELATIONS:
EMPLOYEE COMPLAINTS

DGBA
(MODEL)

PURPOSE

The purpose of this policy is to provide employees an orderly process for the prompt and equitable resolution of complaints. The Board intends that, whenever feasible, complaints be resolved at the lowest possible administrative level.

NOTICE TO EMPLOYEES

The principal of each campus and other supervisory personnel shall be responsible for informing all employees under their supervision of the District's employee complaints and grievances policy. Employees shall be provided with a copy of the policy and instructed in proper procedures for filing complaints and grievances. This information shall be included in the orientation process for all new employees.

DEFINITIONS
COMPLAINT

A complaint under this policy shall include:

1. Grievances involving an employee's wages, hours, or conditions of work.

2. Specific allegations of unlawful discrimination in employment on the basis of sex (including allegations of sexual harassment), race, religion, national origin, age, or handicap or on the basis of the employee's exercise of constitutional rights. (See also DHC)

3. Alleged violations of State Board rules or policies adopted by the Board.

4. Alleged violations of a constitutional, statutory, or common law right.

A complaint must specify the individual harm suffered.

AGGRIEVED PARTY

An aggrieved party is an employee who alleges a violation of a constitutional, statutory, or common law right, or of a State Board rule or local Board policy, in accordance with DGBA. An employee who files a grievance is not necessarily an "aggrieved party." Under State Board rules, different timelines and procedures may apply to "aggrieved parties" than to "complainants." Those distinctions shall be determined on a case-by-case basis.

PRESENTATIONS AND HEARINGS

In most circumstances, complainants shall be entitled to administrative review conferences and an informal presentation of the complaint to the Board; however, aggrieved parties whose legal rights allegedly have been adversely affected such that they are entitled to some type of due process hearing shall be offered a hearing

before the Board or its designee at Level Three. Upon receipt of the written request for a Board hearing, the Superintendent shall determine whether an aggrieved party is legally entitled to more than a presentation and, if so, the type of hearing appropriate.

OTHER REVIEW PROCESSES

Some topics are governed by other review processes and are not subject to this procedure. Employee termination procedures are found in policy series DO (TERMINATION OF EMPLOYMENT). The dismissal or nonrenewal of an employee shall not be the subject of a complaint under this policy except when the District does not otherwise provide for a hearing on the matter. Procedures for appealing career ladder assignments are found in policy DQE (CAREER LADDER APPEALS) and shall not be the subject of a complaint under this policy.

REPRESENTATION

The employee filing a complaint or any employee who is the subject of a complaint may be represented at his or her own expense by a fellow employee, attorney, or other person or organization that does not claim the right to strike. The District may be assisted in processing complaints as it deems appropriate.

GENERAL PROVISIONS

The following shall be general provisions for processing complaints:

1. Complaints shall be heard in informal administrative conferences.

2. Time is of the essence. All time limits shall be strictly complied with, except if extended by mutual consent. All references are to calendar days.

3. The appropriate administrator at each level shall respond to the employee within seven days of a complaint conference. Oral complaints may receive an oral or written response, and written complaints shall receive a written response.

4. The employee has seven days after a response to appeal to the next level. The complaint shall be considered concluded if at any level it is not appealed within the given time limit.

5. All complaints arising out of an event or related series of events must be addressed in one complaint. An employee is precluded from bringing separate or serial complaints concerning events about which the employee has previously complained.

6. Costs of any complaint shall be paid by the party incurring them.

LEVEL ONE

Any employee having a complaint shall meet with the principal or immediate supervisor within fifteen days of the time the employee first knew, or should have known, of the event or series of events causing the complaint.

LEVEL TWO

If the outcome of the complaint conference at Level One is not to the employee's satisfaction, the employee may meet with the Superintendent or a designee to discuss the complaint within seven days after receiving the response.

At or prior to the conference with the Superintendent or designee, the employee shall submit a written description of the decision or action complained of, the date it occurred, the remedy sought, and the date the employee conferred with the principal or immediate supervisor.

LEVEL THREE

If the outcome of the complaint conference at Level Two is not to the employee's satisfaction, an employee wishing to appeal shall present the complaint to the Board at the next regular meeting. In matters involving an aggrieved party, the meeting shall be held within 30 days after the date the written request for a Board hearing was filed with the Superintendent, unless postponed by mutual consent.

BOARD'S ROLE (LEVEL THREE)

The Board shall designate a portion of its regular monthly meeting to hear employee complaints; however, it shall not deliberate, discuss, or decide with respect to any subject that is not included in the written notice (posted agenda) for the meeting, other than to propose to place it on the agenda for a subsequent meeting.

The Board President may set reasonable time limits on complaint presentations. The Board shall listen to the complaint, but is not required to respond or take any action on the matter unless the complaint is from an aggrieved party. (See DGBA)

AGGRIEVED PARTIES (LEVEL THREE)	Aggrieved parties who are entitled to some type of due process hearing shall be afforded that hearing with the Board or its designee at Level Three. If the Board's designee conducts the hearing, the designee shall make a recommendation to the Board at a meeting held within 30 days after the date the request for a Board hearing is filed with the Superintendent. The employee shall be given an opportunity to respond to the recommendation either orally or in writing.
EXECUTIVE SESSION	If the complaint involves the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of the employee bringing the complaint, it shall be heard by the Board in executive session, unless the employee requests it to be heard in public. If the complaint involves complaints or charges against another employee, it shall be heard by the Board in executive session, unless the employee complained about requests it to be heard in public.

MAKING SENSE OUT OF THE TTAS

Many members have expressed a tremendous frustration in understanding just what is expected of them under the new appraisal system. If you successfully complete each of the indicators in the following checklist, you should receive standard expectation credit on every indicator in domains one through four.

BEFORE THE LESSON:

Indicator	Description
3d	Arrange the seating appropriately for the activity.
3e	Have materials, aids, and facilities ready for use.
3b	Use routines to facilitate instruction in the distribution and collection of materials.
3c	Give administrative directions.
4a	Begin promptly—avoid wasting time.

AT THE BEGINNING OF THE LESSON:

Indicator	Description
3a	Secure the students' attention.
6a	Begin instruction/activity with an appropriate introduction.
2a	Communicate learning expectations—what is to be accomplished.
8b	Emphasize the value/importance of activity or content.
6c	Relate content to prior or future learning.
8a	Relate the content to the students' interests.

PRESENTING THE CONTENT OF THE LESSON:

Indicator	Description
7b	Explain content clearly.
7a	Make no significant errors in presentation of content.
7c	Stress important points and dimensions of content.
6b	Present the information in an appropriate sequence.
1a	Vary the activities to keep the students involved and interested.
4b	Implement appropriate sequence of activities.
4c	Maintain appropriate pace—allot adequate time for activities.
4d	Maintain focus—stay on topic.
1f	Implement instruction at an appropriate level of difficulty.
6d	Provide definitions of concepts and descriptions of skills.
6e	Provide for elaboration of critical attributes of concepts—demonstrate steps or components of a skill.
6f	Stress generalization, principle, or rule as a relationship between or among concepts, skills, or attributes.
6g	Provide opportunities for application—apply newly acquired learning.
7d	Use correct grammar—two or more errors can result in no credit.
7e	Use accurate language.
7f	Demonstrate skill in written communication—two or more errors can result in no credit.

ENDING THE CLASS:

Indicator	Description
4a	Avoid wasting time at the end of the instructional period; use the full instructional time available.
6h	Close instruction appropriately—summarize main points and explain how learning will be needed. You may need to close at the conclusion of any segment of instruction.

CREATING THE LEARNING ENVIRONMENT:

Indicator	Description
8c	Reinforce learning effort—communicate appreciation of students' efforts and progress.
8d	Challenge students—can be accomplished through pace, level of difficulty, or through verbal challenges.
9a	Avoid sarcasm, negative criticism, or comments to demean or embarrass.
9b	Establish a climate of courtesy and respect.
9c	Encourage slow and/or reluctant learners.
8c	Provide praise for specific performance.
9d	Establish and maintain positive rapport.

WORKING WITH THE STUDENTS DURING THE LESSON:

Indicator	Description
4c	Keep 85 percent of the students engaged.
2b	Monitor students' performance—circulate.
1b	Interact with students in groups as appropriate.
1c	Solicit students' participation—throughout the lesson.
2c	Solicit responses for assessment of individual progress.
1d	Extend students' responses/contributions.
2d	Reinforce correct responses—tell students, by name, when they are right.
2e	Provide corrective feedback—correct or clarify student misunderstanding.
2f	Reteach using different methods.

MONITORING BEHAVIOR:

Indicator	Description
5a	Specify expectations for behavior—when needed.
5b	Prevent off-task behavior—watch for daydreaming.
5c	Redirect persistent off-task behavior.
5c	Stop inappropriate behavior—watch for aggressive behavior.
5c	Stop disruptive behavior which disrupts one or more students.
5d	Apply rules consistently and fairly—treat all the students the same.
5e	Reinforce desired behavior when appropriate—praise individuals or class.

TTAS AND THE ART OF QUESTIONING

Encouraging and eliciting student participation is a key component of the Texas Teacher Appraisal System. In fact, opportunity to secure student participation should be overlooked. The art of questioning is one of the surest ways to encourage participation and to assess knowledge and understanding. Use of the following techniques can result in improved quality of student responses, greater participation, and increased learning.

A. Provide "wait time."
- Wait at least 3 seconds; count to yourself, if necessary.

B. Avoid dead-end questions such as, "Are there any questions?" or "Does everyone understand?"
- Instead ask, "Can I clarify any point for anyone" OR
- Use active participation devices to check for individual understanding.

C. Be non-judgmental in response to student answers on higher-level questions; avoid put-down questions:
- Increases willingness to participate.
- Example: I've gone over this concept several times with you because it really is a difficult one. I'm sure that some of you might still be a little shaky. It's very understandable that you might still have some questions about it, so let's take a few moments to answer any that you might have.

D. Avoid prefacing question with student's name:
- Raises the attention level of all students appropriately and results in desired covert participation.

E. Avoid answering your own questions:
- Becomes an eccentric mannerism and undermines student participation.

F. Eliminate mimicry, e.g., repeating student answers, unless used as a means of positive reinforcement of a difficult concept
- Undermines effective listening skills.

G. Avoid Questions with Programmed Answers:
Examples: Rather than "I know you don't like math, but explain why it is important to understand fractions," ask "I know you like to cook. How is an understanding of fractions helpful in cooking?"

H. Be clear and specific as to the information being sought.
Examples: Rather than a fuzzy question such as "Do you sort of understand the idea behind this?" ask "Now that we have studied the basic four groups, name one and give three examples of foods in that group."

I. Use questions to indicate transition from one topic to another.
Example: Now that we know how Congressmen get elected, how do laws get passed?

J. Use Low Order Questions to gather specific information such as facts, definitions, names, dates, etc. Evidence is necessary.
- Example: If you could choose, which of the seven continents would you live on, and why?
- Example: In the election of 1896, which state in the Union did William Jennings Bryan represent?

K. Use High Order Questions to require students to explain, compare and contrast, evaluate, justify, etc.
- Example: "Let's review the rocks we have studied and classified. What is the difference between sedimentary and metamorphic?"